BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GUADALUPE M. BURROLA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,882
KANSAS SWINE ALLIANCE	)	
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 18, 2012 Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that he lacked the authority to decide claimant's request for temporary total disability and medical care because this claim was previously dismissed under Docket No. 1,038,091, and no appeal was taken from the July 11, 2008, Order of ALJ Bruce E. Moore.

An Application For Preliminary Hearing in Docket No. 1,038,091 was filed by claimant on September 20, 2011, requesting medical treatment. The matter went to preliminary hearing on February 28, 2012. ALJ Brad E. Avery ruled that the court lacked jurisdiction to hear the merits of the case because it had previously been dismissed by Judge Moore. No appeal was taken from that order.

On March 5, 2012, claimant filed a new Application For Hearing for the same accident as was alleged in Docket No. 1,038,091, and was assigned a new docket number, 1,059,882. In his May 18, 2012 Order, the ALJ found that application to be untimely as it was filed almost four years from the time of the original dismissal Order and almost four years and nine months from the date of the original alleged accidental injury.

Claimant argues that the Order should be reversed contending that she has satisfied the time limitations of K.S.A. 44-534, because she filed an application for hearing in Docket No. 1,038,091, within three years of the date of accident. Claimant contends that the second docketed (Docket No. 1,059,882) claim relates back to the original Docket (No. 1,038,091) filed in 2008 and therefore, the statutory time limitations have been satisfied. Claimant argues that she should be allowed to proceed under either Docket No. 1,038,091 or 1,059,882

Respondent argues that the Order should be affirmed.

RECORD

The Board has considered the record, including the transcript from the deposition of claimant taken on March 20, 2008, with the attached exhibits, the transcript of preliminary hearing taken on July 11, 2008, with the attached exhibits, the transcript of preliminary hearing taken on February 28, 2012, all in Docket No. 1,038,091, and the transcript of preliminary hearing taken in Docket No. 1,059,882, on May 18, 2012, with attached exhibits, together with the pleadings and documents contained in the administrative file.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the May 18, 2012 Order should be affirmed.

The Application For Hearing, K-WC E-1 was originally filed for this accident by claimant's then attorney, Diane F. Barger on December 21, 2007, alleging a date of accident on September 4, 2007, and each working day thereafter. The matter was assigned Docket No. 1,038,091. Claimant was alleging injuries to her low back, legs and all parts affected. Claimant's deposition was originally scheduled on February 27, 2008, but was not taken. Claimant's deposition was rescheduled and ultimately taken on March 20, 2008 with claimant and her attorney present. Claimant was originally examined and evaluated by David L. Liska, C.H., in Lyons, Kansas and referred to and examined by Mark Steffen, M.D., in Great Bend, Kansas, on September 20, 2007.

Claimant was scheduled for a medical examination with Paul Stein, M.D., on March 7, 2008. Claimant and her attorney were advised of the appointment and medical mileage was advanced to claimant for the appointment. Claimant, however, failed to appear for the evaluation. Claimant was rescheduled for an evaluation with Dr. Stein on May 2, 2008. Claimant again failed to appear for the evaluation. Respondent then filed a notice of intent to have claimant reimburse the insurance carrier for the expenses related to these two missed appointments, and to seek dismissal of claimant's claim pursuant to K.S.A. 44-518, due to claimant's failure to appear for the scheduled medical appointments and her deposition.

A notice of hearing in Docket No. 1,038,091 was filed by claimant's attorney, scheduling the matter for hearing on July 11, 2008. The matter then proceeded to hearing on July 11, 2008, for consideration of respondent's Motion to Dismiss and to consider a Motion of claimant's attorney to withdraw as claimant's counsel. Neither claimant, nor her then attorney, Ms. Barger, appeared at the hearing on July 11, 2008. Respondent's motion to have the matter dismissed was granted by ALJ Moore and an order as entered on that date. The Order did not specify whether the matter was dismissed with or without prejudice. Additionally, an order allowing claimant's attorney to withdraw from further representation as claimant's attorney was also granted on that date. Both orders were in Docket No. 1,038,091. No appeal was taken from either Order.

On April 20, 2011, claimant's present attorney entered her appearance on behalf of claimant in Docket No. 1,038,091. Additionally, claimant was referred for a medical evaluation with Pedro A. Murati, M.D., on June 13, 2011. The matter went to preliminary hearing in Docket No. 1,038,091 on March 2, 2012, before ALJ Brad E. Avery. In an Order dated March 2, 2012, in Docket No.1,038,091, ALJ Avery ruled that he lacked jurisdiction to hear the merits of the case as the matter had been previously dismissed by ALJ Moore. No appeal was taken from that order.

An Amended Application For Hearing in Docket No. 1,038,091, was filed on May 22, 2012, listing both Zenith Project, LLC and Kansas Swine Alliance as claimant's employers. The insurance company, American Interstate Insurance Company remained the same. Also, on May 22, 2012, in Docket No. 1,038,091, the Kansas Workers Compensation Fund (Fund) was implead and Zenith Project, LLC was again listed as an employer.

Additionally, claimant filed a separate Application For Hearing on March 5, 2012, listing only Kansas Swine Alliance as the respondent, but, again with American Interstate Insurance Company as the insurance company. This new application was given a new Docket No., 1,059,882, but with the dates of accident and injured body parts remaining the same. The matter in Docket No. 1,059,882 went to preliminary hearing on May 18, 2012, before ALJ Avery. The appealed May 18, 2012 Order currently before the Board was issued from that hearing.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

K.S.A. 2000 Furse 44-518

> If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

The original Order dismissing claimant's claim, issued by ALJ Moore did not specify whether the dismissal was with or without prejudice. The statute is silent on the subject. Additionally, the Board has been cited no appellate case law on that issue, nor has the Board found any. It is noted that the statute differentiates between a suspension of benefits for failure to submit to an examination or obstruction of a health care exam and a dismissal for the failure to appear for an examination for the purpose of determining the amount of compensation due.

If the dismissal is with prejudice, then the dismissal is a final order and the failure to appeal precludes further proceedings or revival of the claim. If the dismissal is without prejudice, then the matter can be re-filed, which in this case claimant accomplished. However, after the matter was re-filed with ALJ Avery, he ruled that the dismissal was final and he lacked the jurisdiction to hear the merits of the matter. Claimant again failed to appeal that contrary ruling. Whether correct or not, this ruling becomes the law of the case.

The doctrine of the law of the case has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate review, sec. 605 in the following manner:

> The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.

In *State v. Finical*[3], the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed, it becomes the law of the case." Here, the dismissal of the original matter by ALJ Moore may have allowed claimant the right to re-file. However, when the matter was re-filed and again presented, this time to ALJ Avery, his ruling of no jurisdiction, and the upholding of the original dismissal, once not appealed, became the law of the case.

Claimant contends that ALJ Avery's Order was not final and thus may be raised at the time of the regular hearing. Generally a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. The Kansas Court of Appeals, however, has recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The Court stated three criteria which make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is not effectively reviewable on appeal from a final judgment.[4]

In *Emery*[5], the Board held that a motion to dismiss an action, when denied, was not a final order. However, the Board held in *Emery*, that had that motion to dismiss been granted, it would have been a final order under K.S.A. 44-551 and would have satisfied the three criteria set forth in *Skahan*.

Here, the motion to dismiss the action was granted. Therefore, the order satisfied the criteria set out in *Skahan* and the order was final. The failure of claimant to appeal that final order, as noted above, is fatal to her appeal.

K.S.A. 2000 Furse 44-534(b)

> (b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

Claimant attempted to resurrect the matter by filing a new and separate claim. In Docket No. 1,059,882, the date of accident and body parts claimed as injured were

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[3] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

[4] *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192, (1982).

[5] *Emery v. State of Kansas*, No. 1,005,338 & 1,038,104, 2011 WL 800418 (Kan. WCAB Feb. 28, 2011).

identical to that claimed in Docket No. 1,038,091. The ALJ ruled that the filing of the second claim was not timely, violating the provisions of K.S.A. 2007 Supp. 44-534(b). Claimant's new claim was filed on March 5, 2012, well beyond the allowed three years listed in the statute. Additionally as no compensation had been paid since the dismissal order in 2008, claimant also failed to satisfy that two year limitation unless the new filing relates back to the prior filing in Docket No. 1,038,091.

Claimant first contends that the filing of the new claim relates back to the original case, which would make the filing timely. However, if claimant is correct, then the new claim, in relating back to the original case, is also controlled by the rulings in the original case, and the "law of the case" dismissal likewise defeats her claim.

If the filing does not relate to the original claim, then it is a new case and must stand on its own. This raises both the above determined question of the timeliness of the filing and whether claimant can challenge the dismissal order in a newly filed case. The Kansas Supreme Court, in *Morris*[6] held that when a defendant fails to appeal from an involuntary dismissal in a case, he cannot raise the issue on appeal in a subsequent case. The defendant in *Morris* was attempting to appeal an order entered in one case through the vehicle of an appeal in another case. The Supreme Court ruled that the court below lacked jurisdiction to determine the issue. Therefore, here, this claimant's attempt to appeal the dismissal in Docket No. 1,038,091, in this newly filed case in Docket No. 1,059,882, fails.

CONCLUSIONS

Because claimant failed to appeal those rulings she is bound by the courts holdings and the results. The May 18, 2012, Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 18, 2012, is affirmed.

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[6] *Morris v. Francisco*, 238 Kan. 71, 708 P.2d 498 (1985).

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
melinda@bretzpilaw.com

Terry J. Torline, Attorney for Respondent and its Insurance Carrier
tjtorline@martinpringle.com
dltweedy@martinpringle.com

John C. Nodgaard, Attorney for the Workers Compensation Fund
jnodgaard@arnmullins.com

Brad E. Avery, Administrative Law Judge